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Thank you, Lucas for the kind introduction. At the outset, it is important to recognize the breadth of the impact language-based discrimination has upon the immigrant community and upon Asian Pacific Americans in particular. We must understand the size, growth, and the demographic characteristics of the Asian American population. Between 1980 and 1990, this population has virtually doubled, increasing by 95%. According to the 1990 census, the majority of Asian Pacific Americans are of immigrant background; 27% of them are limited in English language proficiency. In California, one out of three residents speaks a foreign language at home. It should come as no surprise that the color, culture, and sound of the workplace, along with the population of California generally, is changing rapidly. Nor should it come as a surprise that our response to those changes is anti-immigrant backlash. That backlash takes many forms, Proposition 187 being one of them.

One of the more prevalent manifestations of social tension we are witnessing as this transformation takes place is language-based discrimination. Language discrimination poses a new set of questions and challenges. There are aspects of language discrimination and other forms of national origin discrimination which are different from traditional race discrimination. Discrimination against immigrants and national origin minorities, unlike traditional forms of race discrimination, are not necessarily based on the color of one's skin; rather, it is often based on certain conditions associated with one's immigrant status and/or ethnicity. The discrimination is targeted at one's "foreignness." Perhaps the most salient aspect of that foreignness is one's language, whether it be one's primary (or only) language or accent.

Language-based discrimination can be an easy proxy for race dis-

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crimination; it can serve as an acceptable method of discriminating against a certain group of people without explicitly resorting to race. So, for instance, if an employer wants to "professionalize" the workforce (we've seen this a lot in situations where *e.g.* hotels or restaurants that renovate and employ "hipper" staff and in the security guard industry seeking to "upgrade" its workforce), it might implement a language-based policy such as an English test that must be passed in order to work. Also, an employer might terminate employees with noticeable accents on the ostensible ground that their communication skills are inadequate. Language-based policies, rather than overt racial practices, may thus be used to gentrify the workforce and escape recognition as race discrimination.

The ACLU Foundation of Northern California, along with the Employment Law Center, has established a Language Rights Project that has been in place for more than three years. Donya Fernandez , the Project's staff attorney is here and has brochures describing the Project. With the support of the Rosenberg Foundation and the San Francisco Foundation, the Project gives counsel and advice to people faced with language discrimination issues, and has a toll-free a hotline (1-800-864-1664). We recruit law students, particularly those who can speak Cantonese, Mandarin, and Spanish, to staff the hotline.

LANGUAGE DISCRIMINATION DEFINED

I would first like to define language discrimination. It is a practice or policy that discriminates or disadvantages people whose proficiency in English language is limited, whose primary language is not English, or who speak English with an accent. Outside the employment context, language discrimination takes many forms. One of the cases we are currently working on is challenging Proposition 227, which severely restricts the availability of bilingual education in California. There is a similar political battle brewing in Arizona. Another example are laws making English the "official" language, such as the 1988 law in Arizona which prohibited government officials and employees from speaking a language other than English. Although that law has been declared unconstitutional by the Arizona Supreme Court, the State of Alaska recently passed a similar law. Another example is the failure to provide language assistance to non-English speakers, which we see in many different contexts. We are involved in a case challenging the State of Alabama for discontinuing drivers' license examinations that used to be given in 14 different languages, but which was discontinued after an English-only law passed in 1990. The State stopped giving the exams even though they cost virtually nothing. We are also involved in a claim filed against a local county for its failure to provide Southeast Asian refugees access to public benefits by its failure to provide adequate interpreters and translated written materials. These are all examples of language discrimination.

LANGUAGE DISCRIMINATION IN THE WORKPLACE

In the workplace, there are three types of language-based discrimination we see most often. The first is "speak English only" rules. Employers impose these rules imposed upon workers by telling workers, "You shall not speak Spanish, or Vietnamese, or Chinese, or any language other than English while you're working here." Sometimes it even applies to breaks or lunchtime. Typically, these policies are applied to workers engaged in casual conversation while on the job. In one of the cases that we brought, *Garcia v. Spun Steak* (I'd rather not get into what "spun steak" is, at least not at this hour before lunch), a meat processing plant in South San Francisco decided to impose a speak English-only rule on its workers even though 2/3 of the workers were Latino and a vast majority of them were predominantly Spanish speaking. An incident arose involving a conflict between two employees in which one employee allegedly insulted another in both English and Spanish. In response, the employer decided to impose a plant-wide English-only rule. This is a common context for these rules—often they are instigated because somebody complains. Usually a customer or a co-worker will say, "I can't understand what these people are talking about—they must be talking about me!" In most instances, these feelings and suspicions are based more on paranoia rather than fact, but we hear it all the time. Rather than getting to the root of the problem which is often inter-personal distrust or tension around deeper issues, the employer comes down with an oppressive English-only rule. Such a response is usually inappropriate and ineffective. In the case of *Spun Steak*, the rule made no sense because the alleged insults were in *both* English and in Spanish; the employer had also issued another rule that prohibited all derogatory comments about other employees, no matter what language. That is the proper response since it is targets offensive conduct without discriminating on the basis of language. Moreover, the employer also physically separated the two employees who were allegedly ridiculing their co-worker so that they could not communicate with each other. The English-only rule was unnecessary. As the trial judge put it, it was like hitting a flea with a sledgehammer. Regrettably we see unnecessary and oppressive English only rules in many contexts—not just assembly lines. We see them in banks, retail, hotels, post offices, in both the private and public sector. The practice appears to be pervasive.

The second kind of language-based discrimination is accent-based discrimination—where somebody is either denied a job or a promotion because his or her English is accented. I currently represent a Chinese American woman who worked at a telephone survey company. Her job was to make calls to people who had asked for service from a phone company and find out whether they were satisfied with that service. She was hired as a bilingual telephone surveyor in both Chinese and in English. For three years, although she had a bit of a rocky start, she was com-

mended and received satisfactory ratings. The employer had a system where supervisors monitored the calls and rated how the employee performed in terms of speed, efficiency, professionalism, enunciation, tone and pace. Until a new supervisor came along, my client received scores of 4.0 and 4.25 on her enunciation. Suddenly a new supervisor comes in, doesn't like her performance, and her scores drop immediately to 3.25 and below. She started getting warning letters threatening her with termination. This case illustrates one of the problems inherent in the area of accent discrimination—that is, accent is in the ear of the beholder. Its evaluation is often totally subjective and subject to all sorts of subtle biases and prejudices. Professor Mari Matsuda has written an insightful piece in the *Yale Law Journal* that examines accent discrimination; she unmasks the assumptions and unconscious racism that often lie behind accent evaluation and discrimination. Accent discrimination is commonly directed against persons with a Spanish or Asian language accent. Rarely do we find discrimination against those with a French accent or a German accent. In fact, about a year ago there was an article in a local legal paper that described how some law firms were actively recruiting receptionists with a British accent to enhance their image. One could hardly imagine a company recruiting somebody with a Chinese accent!

The third kind of discrimination is English fluency requirements. It is similar to accent discrimination but it proceeds on a more basic level. In this area, workers may be required to pass a test that, for instance, is given only in English in order to get or maintain a job. We recently investigated a situation where Unocal, the oil company, required prospective franchisees and managers of gas stations to pass an English test sold by the Educational Testing Service. It is the Test of English for International Communication ("TOEIC"). This test is similar to the TOEFL given to foreign language students who come over here and study at our universities, except that the TOEIC was devised primarily for evaluating the English proficiency of business executives in Japan and in Asia, to assist international companies in selecting who could conduct and transact complex business transactions in the U.S.—not exactly something that you would expect would be used to determine who can run a gas station. The TOEIC contains elements relevant to the business environment including cultural cues and contexts and a level of sophistication that is peculiar to the business world business executives might expect to encounter. Yet it is being widely used, as in the case of Unocal, to test American immigrants for whom English is a second language to see whether they can conduct everyday business. In this particular situation, one of the test takers had lived in the United States for 20 years, attended a local high school and City College. In fact, he had actually operated a gas station in Moraga, a town in Contra Costa County that is virtually all white and all English-speaking. He had passed a mechanic's certification test given in English. Yet, he

"flunked" the TOEIC exam, scoring 740 out of 990, 10 points short of the arbitrary passing score that Unocal had set. In another case we are investigating, workers on an assembly line are being required to take a test in English for the first time even though they've been working in the same factory for more than 10 years. Many, who have performed their job successfully, have been fired because their English isn't good enough to understand the written test.

THE EVOLVING LAW ON LANGUAGE DISCRIMINATION

The law in this area is constantly sort of evolving. Thus far, the courts' willingness to protect workers' rights against language discrimination has been uneven. The courts have not exhibited a good understanding of language-based discrimination, its nature and its impact. In the *Spun Steak* case, the Ninth Circuit reversed the District Court's judgment in favor of the workers and rejected the EEOC guidelines on the national origin discrimination. Those guidelines state that English-only rules disproportionately burden national origin minorities by restricting them from communicating in the language in which they are most comfortable and because they tend to create a hostile working environment. Under the guidelines, English-only rules are therefore presumed to be unlawful, and the burden is on the employer to show some business necessity to justify these rules. The Ninth Circuit, however, held that English-only rules are not discriminatory if imposed upon individuals who are bilingual. The court's rationale is that if one can comply with the rule voluntarily, then is merely a matter of "personal preference" which language one speaks and that an employer's regulation of such a personal choice merely causes inconvenience, not discrimination. The court seems to assume that only discrimination based on immutable characteristics is actionable. But the notion that so long as one can physically comply with a job requirement, it cannot be considered discriminatory is insidious. As one of the judges dissenting from the Ninth Circuit's refusal to rehear the case *en banc* pointed out, that reasoning could have applied to Rosa Parks' refusal to go to the back of the bus. After all, she could have physically gotten up and gone to the back of the bus in compliance with the applicable law at the time. But the ability to comply with a discriminatory demand was not and should not be the keystone to our civil rights. The crucial point in Rosa Parks' case, as well as with English-only and similar rules, is that if the requirement is itself demeaning and injurious, it is discriminatory whether or not the individual can "voluntarily" comply with it. The Ninth Circuit, in its ruling, not only disregarded a basic principle of anti-discrimination law, it completely ignored evidence we produced about the harms that are visited on people when they are told they cannot speak their native language—the interference with their ability to communicate, the denial of their ethnic and ancestral heritage, and the devaluation of their personhood and hu-

manity. We presented expert evidence on how these rules inhibit communication and expression—people are most articulate and comfortable in their primary language and may not be as expressive in their second language. The burden of self-censorship in knowing that you could be sanctioned for inadvertently saying a few words in your native language is oppressive. Moreover, given the intimate relationship between one's primary language and their personal and ethnic identity, outlawing that language suppresses an essential aspect of one's identity and being. The court did leave open the possibility that successful challenges could be brought where English-only rules are applied to workers who have difficulty speaking English or where they are applied in such a way or context such that a hostile working environment could be proven in a particular case. The precise showing that must be made in these regards has yet to be clarified. Moreover, it is our hope that other circuits, when faced with the issue, will defer to the EEOC guidelines and hold English-only rules are presumptively discriminatory.

In the area of accent discrimination, the Ninth Circuit has held in *Fragante v. City and County of Honolulu,* that the primary question is whether the employee's accent materially interferes with job performance. While on a general level, this sounds like a fair test, there has been no guidance given from the lower courts as to how that standard should be applied and implemented. There are many unanswered questions. For instance, how do you control the arbitrary discretion, prejudices, and unconscious biases of the trier of fact? How does the court deal with the intolerance of the employee's audience of accents or of certain accents? For instance, in the *Fragante* case itself, the District Court in evaluating the claim of the plaintiff, a Filipino man who had the highest score on the written test but failed the oral exam in seeking a job as a clerk with the Department of Motor Vehicles commented, "Well, this is a very linguistically complex society in Hawaii, and when people hear Filipino accents, they tend to be turned off and that tends to result in a breakdown in communications." This admitted social bias discussed by the court, however, counted for nothing in the Ninth Circuit's ultimate analysis. Yet, it is a real problem that must be dealt with. Catering to such listener bias threatens the integrity of Title VII and civil rights laws generally. Certainly, in other contexts, the defense of customer preferences has been rejected. Nor have the courts amplified what is required to show material interference with job performance and how is that to be evaluated. Is an off-the-cuff assessment by the trial judge sufficient? Should expert linguistic evidence be required?

With respect to English fluency requirements, the appropriate analysis in most instances will be disparate impact theory under Title VII. Generally, it will not be difficult to demonstrate an English language requirement has a disproportionate adverse impact upon *e.g.* Latinos or Asian

American workers. The key is the application of the business necessity test under which the employer is obliged to prove the requirement is demonstrably related to job performance. Here the law is not entirely settled as to the statistical methodologies that are acceptable and the degree of relationship to job performance that must be proven.

There needs to be greater sensitization of the courts in regard to doctrinal developments in this area. As the *Spun Steak* case demonstrates, there needs to be a greater appreciation of the injurious and insidious nature of language discrimination. Moreover, we must educate employers, as well as courts, about language-based discrimination. For instance, we need to convince employers that imposing an oppressive English-only rule in response to fears and suspicions of English-speaking workers actually heightens rather than diminishes tension in the workplace by causing resentment by those who are humiliated and oppressed by such a rule. And, to make things worse, the imposition of an English-only rule tends to confirm rather than allay the suspicions of the English-speakers that language is being misused to malign them. Rather than a punitive and regressive approach that totally ignores the root causes of inter-personal tension of which language use is merely a symptom, we should urge employers to deal proactively and progressively with these problems. For instance, consideration should be given to bringing in diversity training experts who may be able to diffuse tensions by getting people to resolve some of the inter-personal problems that may be at the core of the problem. They may be able to help English-speaking employees understand the benign and legitimate reasons why their fellow employees may prefer, at times, to converse in their native language, while at the same time sensitizing those employees to the fears and feelings of exclusion experienced by English-speaking workers. An effort should be made to open lines of communication amongst all employees rather than oppressing the rights of one group at the behest of another. In contrast to an English-only approach, I've spoken to workers who rather than fearing foreign languages spoken by their co-workers have used the opportunity to learn a new language from them. Employers should take every step possible to engender an atmosphere of trust and friendship wherein language diversity is constructive rather than destructive.

More thought needs to be given to the application of legal principles in the area of accent discrimination as well. For instance, Professor Matsuda has suggested that we borrow principles from disability discrimination law, such as the duty of reasonable accommodation. In other words, if an employee has a slight accent, should not the employer explore whether there could be some reasonable accommodation of that worker? Perhaps his or her job responsibilities could be shifted slightly so that more of the communication might be done in writing or via E-mail. Or the worker could be assigned other tasks that require less intensive oral communica-

tion. In one case we are investigating, the employee is a computer troubleshooter who solves computer problems for fellow employees within the firm. Although he has a fairly noticeable Chinese accent, a lot of his communication is through E-mail. Moreover, because he tends to deal with the same people over and over in sort of a closed environment, there is an opportunity for co-workers to acclimate to his speech. To the extent there nonetheless may be communications problems, there may be things that can be done to accommodate his speech limitations, such as shifting his responsibilities from the on-call help desk to more scheduled program repairs.

Finally, in the context of English fluency requirements, it is essential that the courts apply a rigorous standard of job relatedness, especially where the adverse impact upon minority workers is substantial. The courts must realize and account for the fact that employers tend to impose excessive language requirements; unless there is a labor shortage, employers have little incentive to establish a standard that both satisfies (but not exceeds) actual job requirements and minimizes discriminatory impact upon language minorities. As long as workers are available, many employers will tend to set the bar as high as possible.

CONCLUSION

In the end, the future of language-based discrimination is not only about the economic and civil rights of immigrant workers. It is also about a larger struggle—a struggle over competing visions of America. On the one hand is a vision of intolerance that views diversity as a threat to nationhood and social unity and which seeks to coerce assimilation by making people speak and adhere to the orthodoxy of an "official language." On the other hand is a pluralistic vision which celebrates rather than fears our differences and our diversity. I believe that the struggle of language rights and the willingness of our society to give legal protection and respect to the rights and interests of language minorities is an important part of the struggle over these competing visions. It is a struggle we cannot afford to lose.